

N.Y.S.D. Case #
21-mc-101(AKH)

10-4197-cv

In re September 11 Litigation

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 23rd day of May, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
JOSÉ A. CABRANES,
DEBRA ANN LIVINGSTON,
Circuit Judges.

USDC SDNY
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DATE FILED: May 23, 2012

IN RE SEPTEMBER 11 LITIGATION:

Cedar & Washington Associates, LLC,
Plaintiff-Appellant,

-v.-

10-4197-CV

The Port Authority of New York and New
Jersey, Silverstein Properties, Inc.,
World Trade Center Properties LLC,
Silverstein WTC Management Co. LLC, 1
World Trade Center LLC, 2 World Trade
Center LLC, 3 World Trade Center LLC, 4
World Trade Center LLC, 7 World Trade
Company, L.P., HMM WTC, Inc., Host

MANDATE ISSUED ON 05/23/2012

Hotels and Resorts, Inc., Westfield WTC
LLC, Westfield Corporation, Inc.,
Consolidated Edison Company of New
York, AMR Corporation, American
Airlines, Inc., UAL Corporation, and
United Airlines, Inc.

Defendants-Appellees.

FOR APPELLANT:

SARI E. KOLATCH (Jay B. Spievack,
Kara Gorycki, Cohen Tauber
Spievack & Wagner P.C., New
York, N.Y., Robert D. Fox, Neil
Witkes, Manko, Gold, Katcher &
Fox LLP, Bala Cynwyd, PA, *on the
brief*), Cohen Tauber Spievack &
Wagner P.C., New York, N.Y.

FOR APPELLEES:

LEAH W. SEARS (Beth D. Jacob,
Judith S. Roth, *on the brief*),
Schiff Hardin LLP, New York,
N.Y., *for appellee* The Port
Authority of New York and New
Jersey.

Richard Williamson, Thomas A.
Egan, Flemming Zulack Williamson
Zauderer LLP, New York, N.Y.,
for appellees Silverstein
Properties, Inc., et al.

Christopher Walsh, Paul M.
Hauge, Gibbons P.C., Newark,
N.J., *for appellees* Host Hotels
and Resorts, Inc. & HMH WTC,
LLC.

PETER L. WINIK, Latham & Watkins
LLP, Washington, D.C., *for
appellees* Westfield WTC LLC &
Westfield Corp., Inc.

Charles F. Rysavy, Dawn M.
Monsen, K&L Gates LLP, Newark,
N.J., *for appellee* Consolidated
Edison Co. of New York, Inc.

MAURA K. MONAGHAN (Roger E. Podesta, Debevoise & Plimpton, New York, N.Y., Desmond T. Barry, Jr., Condon & Forsyth LLP, New York, N.Y.), Debevoise & Plimpton, New York, N.Y., *for appellees* American Airlines, Inc. & AMR Corp.

Jeffrey J. Ellis, Quirk and Bakalor, P.C., New York, N.Y., Michael R. Feagley, Mayer Brown, LLP, Chicago, Ill., *for appellees* United Air Lines, Inc. & United Continental Holdings, Inc.

Appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **REMANDED**.

Plaintiff Cedar & Washington Associates, LLC appeals from a judgment of the United States District Court for the Southern District of New York (Hellerstein, J.), dismissing its complaint. Cedar & Washington sought recovery of abatement costs incurred after its building in lower Manhattan was infiltrated by hazardous substances produced by the terrorist attacks at the World Trade Center on September 11, 2001.

Sometime after September 11, 2001, Cedar & Washington undertook to renovate its 12-story office building into a 19-story business hotel. It was notified by the New York State Department of Environmental Conservation and the United States Environmental Protection Agency of the possibility that the interstitial spaces of its building might contain so-called "WTC Dust," which according to the complaint is composed of finely ground substances from the destruction of the World Trade Center, including concrete, asbestos, silicon, fiberglass, benzene, lead, and mercury. To continue renovations, the governmental agencies required Cedar & Washington to remediate the WTC Dust through costly cleanup measures. In this suit, Cedar & Washington seeks to

1 recover those costs from defendants, which include the owner
2 of the World Trade Center site, lessees of World Trade
3 Center buildings, and the companies that owned and operated
4 the two aircraft that were crashed into the Twin Towers.

5
6 The claims are premised on the Comprehensive
7 Environmental Response, Compensation, and Liability Act
8 ("CERCLA"), 42 U.S.C. §§ 9601-9675, and common-law
9 indemnification. The district court dismissed the claims on
10 two alternative grounds: (1) construction of scaffolding by
11 the Federal Emergency Management Agency ("FEMA") in the
12 immediate aftermath of September 11 was "initiation of
13 physical on-site construction of the remedial action" for
14 the purpose of CERCLA's statute of limitation, see 42 U.S.C.
15 § 9613(g)(2)(B), and Cedar & Washington's 2008 lawsuit was
16 therefore untimely; and (2) Cedar & Washington failed to
17 allege either a "release" or a "disposal" of hazardous
18 substances necessary to pursue a claim for cost recovery
19 under CERCLA § 107(a)(1) and (a)(2). 42 U.S.C. § 9607(a)(1)
20 & (a)(2). Following dismissal of the CERCLA claim, the
21 district court dismissed the indemnification claim as
22 "academic." In addition to the grounds upon which they
23 prevailed, defendants made a number of other arguments as to
24 why the lawsuit should be dismissed at the pleading stage.
25 They have renewed many of those arguments on appeal.

26
27 The 96th Congress passed CERCLA "in response to the
28 serious environmental and health risks posed by industrial
29 pollution" and "to promote the 'timely cleanup of hazardous
30 waste sites.'" Burlington N. & Santa Fe Ry. Co. v. United
31 States, 556 U.S. 599, 602 (2009) (quoting Consol. Edison Co.
32 of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005)).
33 Cedar & Washington's CERCLA claims invite the application of
34 CERCLA to a unique and unforeseen factual circumstance.
35 Their resolution may involve thorny questions of statutory
36 interpretation. We are reluctant to resolve such questions
37 absent consideration of a threshold question: whether the
38 attack on the World Trade Center on September 11 was an "act
39 of war" within the meaning of CERCLA's affirmative defense.

40
41 CERCLA Section 107(b) provides an affirmative defense
42 in any situation where the "release or threat of release of
43 a hazardous substance" was "caused solely by . . . (2) an
44 act of war." 42 U.S.C. § 9607(b). The district court was
45 not presented with an opportunity to consider the issue,
46 although all defendants asserted or adopted the affirmative
47 defense in their answers to the complaint. We therefore

1 issue the mandate to the district court for the limited
2 purpose of allowing it to decide in the first instance
3 whether the act-of-war exception in CERCLA, considered in
4 the context of CERCLA's statutory scheme and the intent of
5 Congress, applies in this case. But we will retain
6 jurisdiction over the case.
7
8

9 For the foregoing reasons, following the procedures set
10 forth in United States v. Jacobson, 15 F.3d 19, 22 (2d Cir.
11 1994), a mandate shall issue forthwith remanding this cause
12 to the district court, where it shall permit liberal
13 repleading of the act-of-war defense, solicit briefing from
14 the parties in an expeditious manner, and render a decision
15 within 75 days of the date of this order. After the
16 district court's decision, any party to this appeal may
17 restore jurisdiction to this court within 30 days by letter
18 to the Clerk's Office seeking review, without need for a new
19 notice of appeal. The Clerk's Office will then set an
20 expedited briefing schedule and refer the appeal to this
21 panel.
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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK


Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe